ATTORNEY FOR APPELLANT:

TIMOTHY J. O'CONNOR
O'Connor & Auersch
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DEWAYNE COLEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0607-CR-585
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49F09-0507-FD-113963

March 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Dewayne Coleman appeals from the trial court's revocation of his probation. He presents one issue for review, which we restate as whether the trial court abused its discretion when it determined that Coleman violated a term of his probation by leaving abusive voicemail messages for his probation officer.

We affirm.

FACTS AND PROCEDURAL HISTORY

In January 2006, Coleman pleaded guilty to Residential Entry, as a Class D Felony. The trial court sentenced him to 730 days, suspended, and placed him on probation. As a condition of his probation, the court ordered Coleman to serve 365 days on home detention. On June 13, 2006, while serving his probation, Coleman left for his probation officer two voicemail messages that contained offensive language. Coleman's first voicemail message was as follows:

> You're not gonna be rattin' on me like that. I'm gonna start callin' callin' [sic] Channel 8—all the news stations you all want. Even you say I ain't from this neck o' the woods. What the fuck is that supposed to mean? Where're you from? Well, the whites is right and the niggers is wrong? Suck a dick, Bitch.

State's Exhibit 1. Coleman also left the following voicemail message:

> Now this is Dwayne Coleman again, maybe for the fifth time. (yells) Forty-one, eighty-nine, seventy-two. I'm not understanding y'all. You got me jumpin' through goddamn hoops. I got two motherfuckin' young ass kids that really need me and I call the police on this bitch because both us got attitudes and particularly problems with authority. You don't got no motherfucker telling you when to come and do this shit. It's not right but let me tell you somethin'. The [inaudible] is the scam is than anybody, black, white, Hispanic, whatever. That's the situation I'm in. Now I get a county check, but you motherfuckers say no motherfucker can't touch the check. But yet still, with my family tryin' to beat me out of my money, I

> end up on house arrest (raises voice) with a record (yells) with felonies. What kind of shit is that? You all don't give a fuck. But you know what? Eventually I'm getting my mind right and I'm cuttin' my mouth down.

State's Exhibit 2.

On June 14, 2006, the State filed a Notice of Probation Violation and Notice of Violation of Community Correction Rules. The State alleged that Coleman violated the conditions of his probation by communicating disrespectfully and in a threatening manner toward his probation officer and by violating his Community Corrections Home Detention placement. After an evidentiary hearing, the trial court determined that Coleman had violated the terms of his probation. On June 20, the court revoked Coleman's probation and ordered him to serve 730 days in the Department of Correction, with 167 days credit for time served in jail and home detention. This appeal ensued.

DISCUSSION AND DECISION

Coleman contends that the trial court abused its discretion when it revoked his probation. Specifically, Coleman maintains that the conditions of his probation did not expressly include a provision that prohibited him from the use of profane or threatening language directed at his probation officer, and, therefore, Coleman did not violate the conditions of his probation agreement. We cannot agree.

We review a trial court's decision to revoke probation under an abuse of discretion standard. Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. Brabandt v. State, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003) (citations omitted). "Generally, 'violation of a single condition of probation

is sufficient to revoke probation.'" Id. at 860-61 (quoting Pittman v. State, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001), trans. denied). On review, our court considers only the evidence most favorable to the judgment without reweighing that evidence or judging the credibility of witnesses. Id. at 861 (citations omitted). If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation. Id.

Initially, we observe that Coleman's sole defense at the probation revocation hearing was that he was not the person who made the threatening phone calls and that he asserts for the first time on appeal that the terms of his probation did not prohibit the use of profane or threatening language toward his probation officer. The State counters that Coleman has waived the issue because he did not assert it to the trial court. "Generally, a party may not raise an issue on appeal which was not raised at the trial court." Ross v. State, 704 N.E.2d 141, 143 (Ind. Ct. App. 1998) (citing Ansert v. Ind. Farmers Mut. Ins. Co., 659 N.E.2d 614, 617 (Ind. Ct. App. 1996)). Because Coleman did not assert at trial that his conduct did not violate a term of his probation, Coleman has waived that claim.

Waiver notwithstanding, we address the merits of Coleman's argument. Specifically, he contends that nothing in the conditions of his probation placed him on notice that he was prohibited from using profane and threatening language in communications with his probation officer. Coleman argues further that this lack of notice is a violation of his due process rights. But this court has held that due process requirements in probation revocation proceedings are met when the probationer has notice of the factual basis for which the State seeks to revoke probation and actual notice

that the State seeks to revoke probation. See Braxton v State, 651 N.E.2d 268, 270 (Ind. 1995). Here, the State filed a notice of probation violation, which alleged in relevant part that he "communicated disrespectfully and in a threatening manner towards his Probation Officer" and included quotes of Coleman's abusive language. Appellant's App. at 38. The notice also requested a warrant to be issued for Coleman's arrest and stated that, if a violation were found, Coleman's probation could be revoked. Thus, the notice provided satisfied Coleman's due process rights.

We also note that Coleman's argument that he lacked notice of a probation term is cloaked as a sufficiency of evidence claim. In response, the State asserts that a term of Coleman's probation prohibited him from committing any further offenses and that the evidence shows that Coleman committed the crime of harassment. Coleman claims that the State is barred from using the crime of harassment as a basis for revoking his probation because it was not explicitly raised at the probation revocation hearing. But, if we are to consider Coleman's new contention on appeal, the State has a right to rebut Coleman's argument, and the State should be permitted to point to any evidence in the record to rebut Coleman's claim. Thus, we will determine whether the terms of Coleman's probation prohibited him from committing an additional offense and, if so, whether the evidence is sufficient to support the finding that Coleman committed the offense of harassment.

"[T]he law of this State is well established that although a trial court must specify the conditions of probation in the record, it is always a condition of probation that a probationer not commit an additional crime." Braxton, 651 N.E.2d at 270 (citing Ind.

Code § 35-38-1-2(a)). When the State alleges as a probation violation the commission of a new crime, the State need not prove that the probationer was convicted of a new crime. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006) (citations omitted). Instead, the State is only required to prove by a preponderance of the evidence that the defendant committed that offense. Id. Here, the State alleges on appeal that Coleman committed the offense of harassment, which occurs when a person makes a telephone call with the intent to harass, annoy, or alarm another person and with no intent of legitimate communication, regardless of whether a conversation occurs. See Ind. Code § 35-45-2-2(a)(1).

As evidence of a legitimate reason for the phone calls, Coleman claims that a term of his probation required him to contact the probation officer. But the evidence does not support the contention that Coleman was allowed to harass the probation officer when Coleman contacted her. In the messages, Coleman conveyed no useful or relevant information concerning his probation, and he has not pointed to any evidence to show that the phone calls had any legitimate purpose of communication other than to harass, annoy, and alarm his probation officer. Indeed, the voicemail messages were angry and contained abusive and profane language, and the probation officer's supervisor testified that the probation officer felt threatened. And, in one message, Coleman admitted that the call might have been his fifth to the probation officer. We conclude that such evidence is sufficient to show, by a preponderance of the evidence, that Coleman committed the crime of harassment against his probation officer.

Conclusion

Coleman asserted for the first time on appeal that he had no notice that the terms of his probation prohibited him from communicating in a profane or disrespectful manner toward his probation officer. Thus, he has waived that issue for review. Nevertheless, we have considered the merits of Coleman's claim and hold that the trial court did not abuse its discretion when it determined that he violated a term of his probation. Whether or not explicitly stated, it is always a term of probation that the probationer not commit any further offenses. Here, Coleman left profane and threatening voicemail messages for his probation officer. Coleman has pointed to no legitimate purposes for those communications, nor have we discerned any from the record. Indeed, the record supports a finding that the messages had no purpose other than to harass, annoy, or harm the probation officer. As such, the evidence is sufficient to show that Coleman committed the additional offense of harassment and, by committing that offense, violated a term of his probation.

Affirmed.

MAY, J., and MATHIAS, J., concur.